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Lee Teng Siong v Lee Kheng Lian & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–647 OF 2005

B GOPAL SRI RAM, MOHD GHAZALI AND HASHIM YUSOFF JJCA

31 JULY 2006

Civil Procedure — Summary judgment — Application for — Appeal against decision of

C *High Court dismissing summary judgment application — Whether an application for summary judgment which ought properly to be moved under O 14 but was moved under O 81 was saved by the terms of O 1A — Rules of the High Court O 1A, O 14 & O 81*

D The plaintiff ('appellant') and the defendants ('respondents') were shareholders in a company called Lee Geok Thye Holdings Sdn Bhd ('the Company'). Following disputes between them, the plaintiff presented a petition to wind up the Company on the just and equitable ground under s 218(i) of the Companies Act 1965. The winding up proceedings came to an end when the plaintiff and the defendants

E entered into a consent order which was in essence a buy out by the defendants of all the plaintiff's shares in the Company and some other assets. The plaintiff was to deposit the share certificates in respect of his shares and the duly executed transfer forms with his solicitor. He did that. The defendants paid two instalments of the purchase price. There was then a default. Thereafter, the plaintiff instituted an action to recover the balance of the purchase price. After delivery of the pleadings, the

F plaintiff moved for summary judgment. His summons for judgment recites that it was taken out under O 81 r 1 of the Rules of the High Court 1980 ('RHC'). The learned judge who heard the summons dismissed it. The plaintiff appealed against that order of dismissal.

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Held, dismissing the appeal:

(1) It appeared that the learned judge fell into error in holding that the defendants were not parties to the consent order. They were. He also erred in holding that

H the plaintiff did not have a cause of action. The plaintiff had a good cause of action. He and the defendants had entered into a solemn bargain. The defendants had, after making part payments to him, refused further performance. He was therefore the victim of a breach of contract and was entitled to sue. However, the order of the learned judge must be upheld for different reasons (see paras 11, 14).

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(2) The plaintiff was in essence seeking to recover a liquidated sum due from the defendants. That sum represents the balance due to the plaintiff under the consent order recorded in the winding up proceedings. What the plaintiff sought to do was to recover that sum by resort to O 81 of the RHC. It cannot do that as the substance of its claim falls squarely within O 14 of the RHC

jurisdiction. The two jurisdictions — under O 14 and O 81 — are mutually exclusive. The High Court had no jurisdiction to deal with the plaintiff's claim under O 81. This was not a mere technicality and was not saved by O 1A of the RHC (see para 24).

[Bahasa Malaysia summary

Plaintif ('perayu') dan defendan-defendan ('responden-responden') merupakan pemegang-pemegang saham dalam sebuah syarikat bernama Lee Geok Thye Holdings Sdn Bhd ('Syarikat tersebut'). Berikutan beberapa pertikaian antara mereka, plaintif telah mengemukakan petisyen untuk menggulung Syarikat tersebut atas alasan yang adil dan saksama di bawah s 218(i) Akta Syarikat 1965. Prosiding penggulungan itu berakhir apabila plaintif dan defendan-defendan memasuki satu perintah persetujuan yang pada dasarnya merupakan pembelian oleh defendan-defendan terhadap kesemua saham plaintif dalam Syarikat tersebut dan beberapa aset-aset lain. Plaintif hendaklah mendepositkan sijil-sijil saham berkaitan saham-sahamnya dan hendaklah menyempurnakan boring-borang pindahhak dengan peguamnya. Beliau telah melaksanakan sedemikian. Defendan-defendan telah membayar dua bayaran ansuran harga belian tersebut. Kemudian berlaku kegagalan untuk membuat pembayaran. Setelah itu, plaintif telah memulakan satu tindakan untuk mendapat balik baki harga belian. Selepas penyampaian pliding, plaintif telah memohon penghakiman terus. Saman untuk penghakimannya menyebutkan bahawa ia telah dimulakan di bawah A 81 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim bijaksana yang mendengar saman tersebut telah menolaknya. Plaintif telah merayu terhadap perintah penolakan itu.

Diputuskan, menolak rayuan tersebut:

(1) Ia kelihatan bahawa hakim bijaksana telah terkhilaf dalam memutuskan bahawa defendan-defendan bukan pihak-pihak kepada perintah persetujuan itu. Mereka sememangnya merupakan pihak-pihak. Beliau juga terkhilaf dalam memutuskan bahawa plaintif tidak mempunyai satu kausa tindakan. Plaintif mempunyai satu kausa tindakan yang baik. Beliau dan defendan-defendan telah memasuki satu tawaran yang baik. Defendan-defendan telah, selepas membuat sebahagian daripada bayaran kepadanya, enggan meneruskan pelaksanaan. Beliau oleh itu adalah mangsa satu pelanggaran kontrak dan berhak untuk menyaman. Namun, perintah hakim bijaksana hendaklah dikekalkan untuk alasan-alasan berbeza (lihat perenggan 11, 14).

(2) Plaintif pada dasarnya memohon untuk mendapat balik jumlah boleh dikira yang perlu dibayar daripada defendan-defendan. Jumlah tersebut menunjukkan baki yang perlu dibayar kepada plaintif di bawah perintah persetujuan yang direkodkan dalam prosiding penggulungan. Apa yang plaintif pohon untuk lakukan adalah mendapat balik jumlah tersebut melalui bidang kuasa A 81 KMT. Kedua-dua bidang kuasa — di bawah A 14 dan A 81 — adalah eksklusif. Mahkamah Tinggi tiada bidang kuasa untuk mengendalikan tuntutan plaintif di bawah A 81. Ini bukan perkara bersifat taknikal dan tidak terangkum oleh A 1A KMT (lihat perenggan 24).]

Notes

For cases on application for summary judgments, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6195–6236.

Cases referred to

Alliance Bank Malaysia Bhd v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451 (refd)
CE Heath Pic v Ceram Holding Co [1988] 1 WLR 1219 (refd)
Choong Mee Leng v Lam Chong Seng [2005] 5 MLJ 97 (refd)
Crossmore Electrical & Civil Engineering Ltd, Re (1989) 5 BCC 37 (refd)
Diamond Peak Sdn Bhd & Anor v Tweedie [1980] 2 MLJ 31 (refd)
Habib Mian v Mukhtar Ahmad AIR 1969 All 296 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Hydroscan Ltd, Re (1991) BCC 19 (refd)
Lee Chong Lim v Standard Chartered Bank Malaysia Berhad [2004] 6 CLJ 447 (refd)
Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd [2004] 5 MLJ 13 (refd)
Malayan United Finance Bhd v Noormurni Sdn Bhd [1988] 1 MLJ 395 (refd)
SBJ Stephenson Limited v Mandy [1999] EWCA Civ 1720 (refd)
Society of Medical Officers of Health v Hope [1960] AC 551 (refd)
Tio Chee King v Tractors Malaysia [1973] 1 MLJ 66 (refd)
Tong Lee Hwa & Anor v Chin Ah Kwi & Ors [1971] 2 MLJ 75 (refd)
Western Welsh International System Buildings Ltd, Re (1985) 1 BCC 99,296 (refd)

Legislation referred to

Civil Procedure Code
Companies Act 1965 ss 181, 218(i)
Companies Act [UK] s 459
Rules of the High Court 1980 O 1A, O 14 rr 1, 2(3), O 81 r 1
Rules of the Supreme Court 1883 [UK]
Rules of the Supreme Court 1957 O 14A

Appeal from: Civil Suit No D3–22–452 of 2004 (High Court, Kuala Lumpur)

Dato' RR Sethu (NH Wong with him) (NH Wong & Associates) for the appellant/plaintiff.
Hamid Sultan bin Abu Backer (Hamid Sultan Loga Chitra & Associates) for the respondents/defendants.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The only point at issue here is whether an application for summary judgment which ought properly to be moved under O 14 of the Rules of the High Court 1980 ('RHC') but is moved under O 81 is saved by the terms of O 1A. Here is the factual matrix from which this question emerges.

[2] The plaintiff in the action (appellant before us) and the defendants (respondents in this appeal) are shareholders in a company called Lee Geok Thye Holdings Sdn Bhd ('the Company'). Following disputes between them, the plaintiff

presented a petition to wind up the Company on the just and equitable ground under s 218(i) of the Companies Act 1965. The defendants who were represented by solicitors gave notice of their intention to appear and oppose the petition. The winding up proceedings came to an end when the plaintiff and the defendants (named as opposing contributories) entered into a consent order which was in essence a buy out by the defendants of all the plaintiff's shares in the Company and some other assets. The agreed purchase price was RM10,000,000. The plaintiff was to deposit the share certificates in respect of his shares and the duly executed transfer forms with his solicitor. He did that. The defendants paid two instalments of the purchase price. There was then a default. Thereafter, the plaintiff instituted an action to recover the balance of the purchase price. After delivery of the pleadings, the plaintiff moved for summary judgment. His summons for judgment recites that it was taken out under O 81 r 1 of the RHC. The learned judge who heard the summons dismissed it. In essence he gave two reasons for his decision. First, that the consent order did not bind the defendants: for it was only the Company which was the respondent in the winding up proceedings. The defendants were not parties to the winding up proceedings and they did not make payment to the plaintiff. On the other hand, it was the Company which made the payments. Second, the consent order does not provide for a remedy against the defendants. In the circumstances, the plaintiff had no cause of action against the instant defendants and his action was an abuse of process. The plaintiff has now appealed against that order of dismissal.

[3] Now, let me say at once that it is the usual practice of this court to refuse to entertain appeals against the refusal of summary judgment. That practice was established in 1994 when this court was constituted. Once a judge has held that there are triable issues disclosed in the papers before him, we generally allow his view to prevail. For, upon such an appeal, we are only a court of review and it is not our function to trawl through the pleadings and scrutinise the affidavits to see if the judge was wrong. Once the High Court holds that there are triable issues of fact, it is best that the matter is left to proceed to the stage of case management and then on to its conclusion in the usual way. Indeed, this court is entitled to dismiss an appeal against an interlocutory order without hearing full argument unless some manifest injustice would ensue. An example of the exercise of this power is *SBJ Stephenson Limited v Mandy* [1999] EWCA Civ 1720 where the English Court of Appeal dismissed an appeal against the grant of an interim injunction on the ground that it would be entirely pointless and indeed wrong for there to be a debate at the appellate stage as to whether the plaintiff in that case had a seriously arguable case justifying interim relief until trial. The court accepted that it would not be a correct use of the court's time or cost efficient to enter into the merits of the appeal. The same applies in our jurisdiction.

[4] But this is not a usual case. It is out of the norm. Here there is no dispute as to facts. Quite the contrary. Because, all the material facts are common ground between the parties. What is contended is that the judge misdirected himself on a point of law. The misdirection, it is said, inter alia, lies in the finding by the learned judge that the defendants were not parties to the winding up. I think that there is force in the plaintiff's complaint. A winding up petition is not a lis inter partes. It is not like a civil suit. It is a lis ad rem. All sorts of persons have an interest in winding

up proceedings. You have the creditors. You have the contributories, who, by definition, include the holders of fully paid shares. The view I take is supported by the judgment of Harman J in *Re Western Welsh International System Buildings Ltd* (1985) 1 BCC 99,296 at 99,297.

[5] I must mention that during his argument, learned counsel for the plaintiff also referred us to two authorities to show that the Company was only a nominal party to the winding up proceedings and that the real litigants are the shareholders. They are *Re Crossmore Electrical & Civil Engineering Ltd* (1989) 5 BCC 37 and *Re Hydroscan Ltd* (1991) BCC 19. But these are decisions on s 459 of the UK Companies Act 1985, the equipollent of s 181 of our Companies Act 1965 which concerns proceedings for oppression, unfair prejudice and unfair discrimination inter se the members of a company. They are therefore unhelpful for present purposes.

[6] That said, there are two added features in this case to which I must make reference. First the consent order makes it abundantly clear that the parties to the agreement embodied in it were the plaintiff of the one part and the defendants (described as 'opposing contributories') of the other part. A consent order of the type that is under consideration here is really nothing more than an agreement for valuable consideration that has been entered into between parties to an ongoing litigation. It must be honoured by the respective obligors in the absence of any statutory or common law impediment. And like any ordinary contract, it cannot be impeached save by way of a fresh action based on any of those grounds on which an agreement may be set aside. See *Tio Chee King v Tractors Malaysia* [1973] 1 MLJ 66 (reversed by the Privy Council on the merits); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143.

[7] In *Habib Mian v Mukhtar Ahmad* AIR 1969 All 296, Pathak J when delivering one of the judgments of the Full Bench said:

> There is authority for the proposition that a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement, that it is but a contract with the command of a Judge superadded to it and in construing its provisions the fundamental principles governing the construction of contracts are applicable. *Nagappa v Venkat Rao* (1901) ILR 24 Mad 265; *Amrit Sundari v Sharajuddin* AIR 1915 Cal 464; *CJ Smith v A Kanny* AIR 1924 Pat 231 and *Jahuri Lai v Kandhai Lai* AIR 1935 Pat 123.
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> One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of the compromise decree must be analysed.

[8] In my judgment, the consent order vested in the plaintiff a cause of action he did not previously have against the defendants. *Tong Lee Hwa & Anor v Chin Ah Kwi & Ors* [1971] 2 MLJ 75 is authority for the view I take. In that case, Gill FJ when delivering the unanimous decision of the Federal Court said:

> After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement

(see *Attorney-General v Tomline* (1877-8) 7 Ch D 388). The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see *Ainsworth v Wilding* [1896] 1 Ch 673). The same rule must apply, a fortiori, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.

In re Ream (1913) 108 LT 452, 737 is usually cited as the authority for the proposition that a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit. In that case not only did the compromise go outside the ambit of the original action but, first, no liberty to apply had been reserved at all and the stay was absolute and unqualified, and, secondly, the relief sought by an application in the same proceedings was not a mere enforcement of the agreed terms but to modify them to give effect to the original intention in changed circumstances. It was held by Sargant J. that such an application could not be made by a summons in the original action which was commenced in 1908 by originating summons, but that independent proceedings must be taken. An appeal against that decision was dismissed by the Court of Appeal. The main ground for the decision in the Court of Appeal was that the applicant was seeking relief against trustees outside the ambit of the compromise itself, but Cozens-Hardy MR went on to say at p 738:

> But apart from that, although that alone is a sufficient ground for dismissing this appeal, there is also this further ground — namely, that this is an attempt to enforce, not a title under the will, which alone was dealt with by the trustees' summons, but an entirely new and independent bargain between the husband and the wife, and that could not be done in the old proceedings.

[9] The second feature is this. After the consent order had been entered into, the instant defendants took out an application in the winding up to set it aside. It was the defendants' case that their solicitor had entered into the consent order without their authority. Vincent Ng J rejected that contention. His judgment is reported in *Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd* [2004] 5 MLJ 13. After examining the evidence before him he made the following findings:

> Prior to the filing of this motion, there was part performance of the consent order, in that the petitioner deposited his share certificates and the duly executed memorandum of transfer with his solicitors, and the applicants and the other opposing contributories had made two payments. The applicants and the other contributories then defaulted in the payment of the third and subsequent instalments. Hence, in my view, the applicants, by the present motion are attempting to renege from the consent order and to get out of their obligations to perform the agreed terms of the consent order.

[10] These findings bind the defendants in the instant suit. Indeed I can find no clearer case of estoppel. And I need only quote from the speech of Lord Radcliffe in *Society of Medical Officers of Health v Hope* [1960] AC 551:

The principles of law governing estoppel per rem judicatam inter partes are generally repeated in the form derived from the words of *de Grey CJ in the Duchess of Kingston's Case* (1776) 20 St Tr 355, 538n and quoted by Lord Selborne LC in *Reg v Hutchings* (1881) 6 QBD 300, 304 (CA):

> '… the judgment of a court of concurrent' (or of exclusive) 'jurisdiction, directly upon the point, is conclusive… between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.'

Other authorities have added the requirement that there must be a lis inter partes for the judgment to proceed upon, and that the court must be a court 'of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes': see *Inland Revenue Commissioners v Sneath* [1932] 2 KB 362, pp 380–381.

[11] Based on what I have said thus far, it appears that the learned judge in the present instance fell into error in holding that the defendants were not parties to the consent order. They were. He also erred in holding that the plaintiff did not have a cause of action. The plaintiff surely has a good cause of action. He and the defendants had entered into a solemn bargain. The defendants had, after making part payments to him, refused further performance. He was therefore the victim of a breach of contract and was entitled to sue. If these be the only points at issue, then this appeal may well succeed and leave may have to be granted to the plaintiff to sign summary judgment on the uncontroverted facts. But that is not the case. And that brings me to the real issue in this appeal: the one identified at the commencement of this judgment.

[12] If you look at the plaintiffs summons for judgment, you will see that it says that it is — and here I quote the actual words used — 'an application on the part of the abovenamed plaintiff under O 81 r 1 of the Rules of the High Court 1980'. The prayer in the summons for judgment claims an order that the defendants pay to the plaintiff 'the sum of RM6,800,000 being the balance of the purchase price for the assets as set out on the Schedule hereto'. The Schedule sets out the plaintiff's shares in the Company and in another company called Malinjaya Sdn Bhd and two lots of land in the District of Kuala Pilah.

[13] The defendants argue that what the plaintiff's claim is for a liquidated sum and not for the relief of specific enforcement. The plaintiff ought therefore to have proceeded under O 14 and not under O 81. The plaintiff says that it does not matter that the summons recites that it was being taken out under O 81 and that the learned judge could have simply proceeded under O 14. In support of his argument, the plaintiff relies on O 1A which reads:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[14] It is the plaintiff's submission that though the application states that it was made under O 81 and not under O 14, this is a mere technicality and should be ignored by the court as inconsequential. The judge, it is said, should have acted under O 14 and entered judgment for the plaintiff. Having given the arguments in this case my most anxious consideration I have come to the conclusion that this appeal must fail and that the order of the judge must be upheld, albeit for different reasons.

[15] At common law, a court — even a superior court of record – has no jurisdiction to enter judgment summarily against a defendant to an action. It was the English Rules of the Supreme Court 1883 that empowered the High Court to enter judgment summarily in cases where a writ was specially indorsed. However, special indorsement of a writ was not permitted in cases involving an allegation of fraud or in cases of libel, slander and malicious prosecution. In 1957, our Rules Committee discontinued the use of the FMS Civil Procedure Code and introduced the Rules of the Supreme Court 1957 which were based (save in areas of the levying of execution) on the 1883 Rules. Under the 1957 Rules, the O 14 procedure as framed in the 1883 Rules was introduced, although this summary judgment jurisdiction did already exist under the provisions of the Civil Procedure Code. There was however no jurisdiction in the High Court to enter judgment summarily in cases of specific performance and rescission. The jurisdiction to enter summary judgment in cases of specific performance was conferred through an amendment to the 1957 Rules by the introduction of an O 14A. In the comprehensive procedural changes that took place in 1980, this summary jurisdiction was written into O 81 which is the current empowering provision. Take away O 81 and you cannot enter summary judgment for specific performance or rescission. Likewise with O 14. Take it away and the court has no jurisdiction to enter summary judgment. I have made these points to show that O 14(1) and O 81(1) of the RHC are not merely procedural in nature. They are jurisdictional. I cannot overemphasise that absent these two rules of court there is no power in the High Court to enter summary judgment.

[16] Further, O 14 in r 2(3) makes it amply clear that it is mutually exclusive from O 81. It says:

> This Order shall not apply to an action to which Order 81 applies.

[17] This exclusivity is important because the jurisdiction that the court exercises under the former is distinct from the latter. Thus, a plaintiff cannot move under O 14 until after appearance is entered. However, an appearance to the writ is not a sine qua non of the summary judgment jurisdiction conferred under O 81. Also, O 81 is only concerned with the forms of specific relief or damages as an alternative thereto as provided by that rule of court. Last but not the least, the procedure to be followed under O 81 is markedly different from that prescribed by O 14.

[18] All that I have said thus far accords with the views expressed by this court in *Choong Mee Leng v Lam Chong Seng* [2005] 5 MLJ 97. At the risk of repetition, this is the view that was expressed:

> 4. It is not open to argument that the foregoing rule of court is jurisdictional in nature. But for the rule the court has no jurisdiction to enter summary judgment in the cases set

out therein. It is to be noticed that O 81 does not include the declaratory decree among the relief that may be granted summarily. Compare this with the English RSC 1997 which empowers an English court to summarily grant a declaration that a contract is at an end. But neither the English rule of court nor ours empowers a court to include a declaration that a contract is subsisting. It follows that the court has no power to enter summary judgment either under procedure prescribed by O 14 or O 81 save in a case expressly provided for in either of these rules of court.

5. In *Cotra Enterprises Sdn Bhd v Pakatan Mawar (M) Sdn Bhd* [2001] MLJU 358, Ahmad Maarof JC had before him a case in which the plaintiff had sought summary judgment under O 14 for a declaration the substance of which was that five written agreements he had entered into were void and had been rescinded. The learned judicial commissioner held — and in our judgment correctly held — that the declaration sought was in essence an order for rescission within O 81 and therefore fell outside the scope of O 14. In the present case, the facts are inverted. Here the respondent obtained a declaration under O 81 when that form of relief is not one of the remedies available summarily under the order. It is our very respectful view that the High Court was plainly wrong in making the order which it did as it simply did not have the power to do so.

6. In *CE Heath Pic v Ceram Holding Co* [1988] 1 WLR 1219, Neill LJ made the following observation:

> The scope of O 14 proceedings has been a matter which has been determined by the rules. There would therefore appear to be little, if any, room for an argument that the court has some wider powers in these fields than that conferred by the rules, or that it has some residual or inherent jurisdiction to grant relief where it is just to do so, or that the wide language of the statute confers some additional powers to act outside and beyond the rules.

That passage in our respectful judgment applies to the summary procedure created by O 81 of the RHC.

[19] What we are therefore concerned with are not two different procedures to achieve the same result but two entirely different types of jurisdiction. Now, O 1A (of which I must confess to be the draftsman) speaks of the 'technical non-compliance of any of the rules'. A good example of a technical point is the very recent case of *Alliance Bank Malaysia Bhd v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451. In that case, objection was taken to the admissibility of an affidavit on the ground that the affidavit did not carry a complete jurat. Ramly Ali J treated the omission as a pure technicality and excused it. But what we have here is a jurisdictional point: not a mere technical non-compliance of the rules of court. And, it is settled law that neither consent nor waiver may confer jurisdiction on a court that has none. As Lord Reid said in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 1 All ER 326 at p 330:

> [I]n my judgment it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

[20] An irregularity may be waived by the court; a want of jurisdiction cannot. It therefore follows that O 1A has no application to the present instance.

[21] In support of his argument that the High Court should have treated the mention of O 81 as a matter of no consequence learned counsel for the plaintiff cited *Lee Chong Lim v Standard Chartered Bank Malaysia Berhad* [2004] 6 CLJ 447. In that case, the plaintiff sought summary judgment purportedly under O 81 for specific performance of an agreement he had with the defendant bank. One of the grounds on which the summons was opposed was that the contract was to lend money and that specific enforcement of such a contract would not be granted in accordance with well established principles that guide the discretion of a Court of Equity. The learned judge in that case appears to have treated a substantive objection going to discretion as a purely procedural objection. He said:

> First, I shall deal with the purely procedural point that the application does not come within the ambit of O 81(1)(a), (b) and (c) to which counsel for the defendant has correctly submitted is concerned merely with specific performance 'for the sale, purchase or exchange of property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages'.
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> Rightly therefore, this application should have been made under the general provision of O 14 which has a larger foot-print to include the grant of an order of specific performance of other contracts. But an incorrect citation of the orders of the RHC is not necessarily fatal, where the substance of the application is clear and comprehensible to the defendant — to seek by way of an application for summary judgment the specific performance of a contract. The court looks to the substance not the form. The rule is now made all that much clearer with the recent introduction of O 1A of the RHC…

[22] With respect, I am unable to accept the view taken by the learned judge in Lee Chong Lim v Standard Chartered Bank Malaysia Berhad. As I have already said, what appears to have been taken was a point of substance and not mere procedure. Also, the jurisdictional point taken before us does not appear to have been argued in that case. I therefore do not think that that case really assists the instant plaintiff.

[23] There is another point I need to mention. It has to do with the approach of the learned judge in this case. Now, what he had before him was a summons for judgment. Whether it be one made under O 14 or O 81, the only question he had to answer was whether there were bona fide triable issues that merited a full trial. He would certainly have been entitled to identify such issues. Unfortunately he went further to make findings on the merits of the case. This, with respect is outside the scope and purview of the two orders earlier referred to. If authority is needed, you will find it in *Diamond Peak Sdn Bhd & Anor v Tweedie* [1980] 2 MLJ 3 1.

[24] To sum up, this is a case where the plaintiff is in essence seeking to recover a liquidated sum due from the defendants. That sum represents the balance due to the plaintiff under the consent order recorded in the winding up proceedings. What the plaintiff seeks to do is to recover that sum by resort to O 81 of the RHC. It cannot do that as the substance of its claim falls squarely within the O 14 jurisdiction. The two jurisdictions — under O 14 and O 81 — are mutually exclusive. The High Court had no jurisdiction to deal with the plaintiffs claim under O 81. This is not a mere technicality and is not saved by O 1A.

A **[25]** For the reasons already given, this appeal fails. I would dismiss it with costs and affirm the orders made by the learned judge but for different reasons. The deposit must be paid out to the respondents to account of their taxed costs.

B **[26]** By way of postscript I must add that this dismissal does not preclude the plaintiff from filing a fresh application under O 14 as this is not a case where the summons for judgment has been dismissed on merits. So no question of issue estoppel may arise here as happened in *Malayan United Finance Bhd v Noormurni Sdn Bhd* [1988] 1 MLJ 395.

C **[27]** My learned brothers, Mohd Ghazali and Hashim Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

D Reported by Peter Ling

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